



COMMONWEALTH OF MASSACHUSETTS
Board of Registration
of
Hazardous Waste Site Cleanup
Professionals

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DRAFT
PROFESSIONAL CONDUCT COMMITTEE
Minutes of Meeting on March 5, 2007
[Approved on April 18, 2007]

Prepared by: Lynn Peterson Read

Meeting Location: JSI Center for Environmental Health Studies, 44 Farnsworth Street, Boston, Mass.

1. Call to Order: Debra Stake called the meeting to order at 12:35. Also present were Gail Batchelder, Deborah Farnsworth, Kirk Franklin, Christophe Henry, Gretchen Latowsky, Robert Luhrs, Debra Phillips, and Kelley Race. Committee members absent: Janine Commerford and Paul Mullen. Staff members present were Allan Fierce, Brian Quinlan, Lynn Read, Jan Reitsma, and Terry Wood. Also present were Lawrence Feldman of the LSP Association; and Maria Pinaud of MassDEP.

2. Announcements: None.

3. Previous Minutes: The draft minutes of the meeting held on January 22, 2007, were approved.

Ms. Stake stated that the agenda for the meeting would be changed to add a discussion of information from DALA relevant to the Board's ongoing consideration of alternative disciplinary procedures.

4. Old Business

A. Status of CRTs

At Ms. Stake's request, the chair of each CRT reported on progress made during the last month.

B. Website Subcommittee

Mr. Fierce described two aspects of the ongoing work on the LSP Board's website. First, the Board has indicated that it would like to improve the design and appearance of the site. This self-imposed goal has been tasked to the Board's website subcommittee, and there is no deadline for the completion of this work. To date, the subcommittee has yet to commence work on this project.

Second, the Board must respond to a directive from the Commonwealth's Chief Information Officer at the Information Technology Division (ITD), concerning the state's "web accessibility enforcement program." This directive requires each state agency, including the Board, to (a) evaluate how well its website complies with the state's Web Accessibility Standards and (b) prepare a remedial plan outlining the steps necessary to bring its website into compliance. By March 31, 2007, each agency must submit to ITD a certification that it has conducted this evaluation and that it has a remediation plan to correct identified deficiencies within a six-month timeframe. The required changes are generally fairly simple, including listing documents in both HTML and Word formats. Mr. Fierce reported that Chris Borges has been working on the evaluation of the Board's website and the remediation plan, and he said he anticipates no difficulty in submitting the required certification by March 31.

C. Division of Administrative Law Appeals (DALA)

Mr. Fierce reported that on March 1, 2007, he attended a luncheon at the Boston Bar Association at which three magistrates from DALA presented information regarding, among other things, how DALA operates and some practice tips. Most of their presentation focused on the appeals from the initial decisions of MassDEP. The magistrates, Mark Silverstein, Jim Rooney and Natalie Monroe, were reluctant to discuss the topic of delays in DALA's process, but they reported that Governor Patrick is committed to streamlining the permit process. So far, however, DALA has taken no special steps to increase its pace of decision-making. It has yet to receive any additional funding or staff. Remarkably, it has taken no steps in response to the language in the Permit Streamlining Act, passed in 2006, that states: "It shall be the responsibility of the [DALA] chief administrative magistrate to verify that written recommended final decisions are issued within 90 days after the record is closed." The magistrates believe that the Permit Streamlining Act requires them to move quicker only on certain very large development projects such as "big box" stores.

Mr. Fierce reported that the magistrates acknowledged that the cases from the LSP Board are among the hardest to process, because the issues are highly technical, many violations are asserted, multiple sites can be involved, and the documentation that must be digested to render a recommended decision is voluminous. The magistrates also acknowledged that they perform a "triage" of all incoming cases, and that new cases with high potential prominence or impact receive priority, even over cases that have already been tried at DALA and are simply awaiting a written recommended decision by the magistrate who held the hearing.

The Governor's proposed budget appears to include new positions within DALA to alleviate the backlog, but it is not clear that the proposed budget contains additional money for those

positions. The only other positive note he heard, Mr. Fierce said, was that the magistrates indicated that DALA is always interested in exploring new approaches that can improve decision-making, and it would be willing to sit down with agencies and discuss creative solutions. But the magistrates acknowledged that one impediment to some solutions is the so-called “separation rule,” a budget restriction that mandates that DALA “maintain, to the fullest extent practicable, a complete physical and technological separation from any agency, department, board, commission or program whose decisions, determinations or actions may be appealed to it.” This would appear to preclude one option the Board had been discussing – a panel comprising a DALA magistrate and two LSP Board members.

5. New Business

A. Request for Reconsideration of Dismissal of Complaint No. 06C-05

Ms. Phillips and Mr. Fierce were recused and left the room.

Ms. Read reported that the Board received a formal petition, filed pursuant to 309 CMR 7.06(3), from the complainant in Complaint No. 06C-05 requesting that the Board reconsider its decision to dismiss the complaint before investigation (after review by a screening team). Ms. Stake asked what the procedure is for addressing such a request. Ms. Read responded that the Board has three options: 1) conduct an initial review of the request for reconsideration to determine whether the request presents grounds that the screening team did not consider; 2) refer the matter back to the screening team that made the original recommendation; or 3) appoint a second screening team to consider the request for reconsideration and make an independent recommendation to the Board as to whether the complaint should be dismissed. Ms. Wood stated that the Board has discretion whether to reopen the matter, and could determine from a review of the request for reconsideration not to do so. The Board asked whether the request presented new information that the screening team had not reviewed, and Ms. Read responded that the request included documents that were not part of the DEP file the screening team had reviewed. After discussion, the Board voted unanimously to (1) remand the complaint and the request for reconsideration to the original screening team; (2) instruct Board staff to forward a copy of the request for reconsideration and its attachments to the LSP who is the subject of the complaint, with a letter stating that this information was being provided to the LSP as a courtesy and the LSP need not respond; and (3) if the LSP nevertheless responds to the request for reconsideration, the screening team will consider any information provided by the LSP.

Ms. Phillips and Mr. Fierce returned and rejoined the meeting.

B. Discussion of Board Policy Regarding Dismissals of Complaints

Mr. Fierce requested that the Board address the following question: Should the Board enforce its policy approved on 9/23/98, and stated in the flowchart, that states: *Before a CRT may recommend to the Board that a complaint be dismissed, the CRT shall offer the*

complainant a reasonable opportunity to present any reasons why the complaint should not be dismissed.

Ms. Wood stated that the policy was adopted after the Hebert case, in which the Board dismissed the Complaint that MassDEP had filed. Ms. Wood stated that since that time, this policy has never been enforced. In the time since the Board approved the policy, the Board has dismissed eight complaints, six of which MassDEP had filed, and two of which private citizens had filed. MassDEP has included far more information in its complaints, and the Board has conducted very intensive and thorough investigation that looks at all primary documents in the MassDEP site file, before determining whether to dismiss the complaint after investigation.

Mr. Fierce stated that he feels the policy is a good one for two reasons. First, checking back with the complainant before recommending dismissal is a well-regarded and often used investigative technique. It serves as a “reality check” to ensure that the CRT has obtained and understood all the facts known to the complainant and that the complainant does not have any information that calls into question the accuracy of otherwise dispositive information the CRT has obtained from DEP files, the respondent, or other sources. Second, it would be easier for the Board to quickly solicit comment from the complainant informally, before issuing the dismissal, than to have to consider and respond to a formal request for reconsideration. Ms. Pinaud added that she recalled a case, after the Board established this policy, in which Mr. Fierce informed her that the Board was planning either to dismiss the case or issue a private censure, and she provided information that caused the Board to issue a more stringent penalty of public censure.

Ms. Wood stated that she feels strongly that the Board should not implement this policy, because the Board now investigates complaints so thoroughly that going back to the complainant would not change the outcome of the CRT’s recommendation. To implement this policy now would cut against all the Board’s efforts to close these thorough investigations more quickly, and reduce the backlog of investigations. To ask the complainant for comment would add time to the preliminary investigation, as demonstrated with the request for reconsideration being considered today. Such an effort is appropriate in light of the formal request for reconsideration, but would destroy the momentum generated by the CRT in its investigation.

Mr. Luhrs stated his strong agreement with Ms. Wood’s point that requesting input from the complainant would force the CRT to do its work a second time, because in fairness, the CRT would then have to return to the respondent LSP and ask for response to the complainant’s position. Ms. Batchelder said she would be concerned if the Board based a decision not to enforce this policy on the existence of the backlog, which might imply that once the Board has eliminated the backlog, such a policy might be appropriate. If the policy is fair and appropriate without a backlog, then it is fair and appropriate generally, including when a backlog exists. Ms. Stake responded that the complainant always has the option to file a formal request for reconsideration, and this policy might lead to cases never being closed. Mr. Luhrs commented that the Board already goes out of its way to be fair to the MassDEP and other complainants, by reviewing all the LSP’s Notices of Audit Findings (NOAFs), and

where appropriate based on that review, expanding investigations to consider whether the LSP has a pattern and practice of violating the professional standards. Ms. Batchelder asked whether the Board's letter informing the complainant of the dismissal also informs them of their right to seek reconsideration of the decision. Ms. Wood stated that the letter does not separately inform the complainant of their right to request reconsideration, but that if the complainant calls with questions about the dismissal, he or she will be told of the right to request reconsideration.

Mr. Fierce urged the Board not to overstate the difficulties of implementing the policy. The complainant could be asked as a courtesy whether there is anything the CRT has missed. Ms. Wood pointed out that the CRT may agree with the complainant's underlying facts, but conclude that the LSP's work does not violate the Rules of Professional Conduct and does not warrant discipline. In such a case, the complainant's view of the facts has no effect on the CRT's decision to dismiss.

Ms. Phillips commented that most CRTs' decisions to recommend dismissal rest on a combination of factual findings and other factors, and that complainants have many motives, including business reasons, for filing complaints against LSPs. Therefore, a complainant's dispute with one specific finding is not likely to result in a different recommendation by the CRT. She agreed with Mr. Luhrs and others that the CRTS do such a thorough investigation, that the Board does not need to add a conference with the complainant as another step in the investigation. However, she is not opposed to informing the complainant of a right to seek reconsideration. Ms. Latowsky added that it is important to validate the work of the CRT, and there appears to be no reason to go back to the complainant before dismissal, except perhaps in special circumstances.

The Board voted unanimously to rescind the policy quoted above.

C. Discussion of Board Policy Regarding Listing of Complaints on Website

Ms. Wood asked if the Board would clarify its policy on when new complaints should be listed on the website. Currently, the Board has no formal written policy for this, as it does for providing information to telephone callers about complaints. The informal policy the staff has been operating under is that a website listing and a telephone disclosure should be as identical as possible. Under this current informal policy, sometimes a new complaint remains unlisted on the website and undisclosed in telephone calls for several months, due either to the LSP's requests for extension of the time to respond, or the need for a screening team to review primary documents and make a recommendation whether the Board should appoint a CRT to investigate the complaint. The problem is that the website viewers do not get the same information as telephone callers.

The telephone policy, approved by the Board in December 2000, requires the staff, when they receive a call asking about the disciplinary status of a specified LSP, not to reveal complaints that have been received but not yet screened by the Professional Conduct Committee and either accepted for investigation or dismissed. Importantly, however, callers

are to be informed that the Board may have received other complaints that have not yet been screened, and the caller should not conclude that there are no other complaints that have been filed against the LSP. Specifically, the written telephone policy states:

If the staff member says, “We have no screened complaints that have been received against [LSP],” the staff member should also say that this statement should not be taken as an indication, one way or the other, whether any non-screened complaints exist against the LSP who is the subject of the caller’s inquiry.”

These statements are to be provided even if the caller is inquiring about an LSP against whom no recent complaints have been filed.

Sometimes a complaint remains unlisted and undisclosed on the website for several months, and sometimes the first listing on the website is that the Board dismissed the complaint before investigation. This occurs because the staff does not disclose the complaint until the Professional Conduct Committee has screened it. Delays in screening result from either the LSP’s requests for extension to respond to the complaint or the screening team’s review of primary documents. From the initial receipt of the complaint to the screening by the Committee, Respondent’s website record states only: “This licensee has not been disciplined by the Board.” That same statement also appears whenever no complaints have ever been filed against an LSP. In both instances, no further statement is provided regarding the possible existence of non-screened complaints.

Some staff members questioned whether it would be preferable to list new complaints on the website at the time they are received, even before they are screened.

Mr. Feldman noted that one fairness issue with this policy is that, if new complaints are listed before the Board has had a chance to review them, frivolous complaints that the Board will summarily dismiss may remain on the website until the Board has reviewed them. On the other hand, Board members noted that the public might remain unaware of valid complaints against LSPs for many months. They reasoned that it would not be fair to leave complaints unlisted for a substantial amount of time, especially if the delay is due to the LSP’s request for an extension of time in which to respond to the complaint.

Mr. Henry suggested that the Board could adopt a cutoff point, such that if the LSP’s request for extension results in a delay of more than two months in presenting the complaint to the Board, then the complaint will be listed on the Board’s website, and it may be revealed by Board staff in response to telephone inquiries with the same explanation.

Mr. Luhrs suggested that the website could include specific explanatory language for complaints received but not yet screened by the Board. Ms. Wood noted that special language might allow Board members who happen to look at the LSP’s history on the website to discover which complaint is about the person when it later comes up for discussion.

The Board voted unanimously to table this issue and directed staff to seek input from the Website Subcommittee to address this issue in more depth when it meets in the future.

- 6. Future Meetings:** The Committee will next meet on April 18, 2007, at either the Northeast Regional Office of MassDEP in Wilmington or the Central Regional Office in Worcester. The Committee will also meet on May 23, 2007, at a location to be determined.
- 7. Adjournment:** The meeting was adjourned at approximately 1:54 p.m.